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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. **76-394**

Annie Mary Timmons,

Petitioner,

vs.

Thomas O. Lawton, Jr., et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

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No.

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Thomas O. Lawton, Jr., et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on May 26, 1976.

OPINIONS BELOW

The opinion of the United States District Court for the District of South Carolina, at Columbia granting Respondents' Motion for Summary Judgment is printed in Appendix "C" hereto. The opinion of the Court of Appeals, which affirmed the District Court, is printed in Appendix "B" hereto and is not yet reported.

JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit was made and entered on May 26, 1976. A timely petition for rehearing was denied on June 21, 1976, and is printed in Appendix "A" hereto.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner brought suit for damages in the United States District Court against

the individual members of a state commission, alleging the commission's condemnation of her real property violated her rights and privileges under the Fourteenth Amendment and Title 42 U.S.C. 1983. The District Court granted Summary Judgment against Petitioner on the premise that an unsuccessful State Court action against different parties on a different cause of action was a bar to the suit in District Court. The Court of Appeals affirmed the Summary Judgment, saying the parties and the cause of action were the same. The questions presented are:

1. Does the doctrine of res judicata bar a suit for damages against the members of a state commission in their individual and personal capacities where the prior action was for injunctive relief against the commission and the state itself?
2. Can the doctrine of res judicata as

applied below, bar a suit brought under 42 U.S.C. 1983 and thereby deprive Petitioner of redress in the Federal Courts where there is no adequate state remedy?

STATUTES INVOLVED

42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

The Petitioner was the owner of a parcel

of land located inside the City of Columbia, South Carolina, upon which were located structures used as residential property rented to tenants, with these rental units providing the great bulk of Petitioner's livelihood. Located on the same block as the Petitioner's property was and is an historic building known as the Hampton-Preston Mansion, which the Commission acquired in connection with the celebration of South Carolina's Tri-Centennial Anniversary.

In 1969, the members of the Tri-Centennial Commission, or those acting under their direction and control, desiring the said property of Petitioner for gardens and parking adjacent to the Hampton-Preston Mansion, prevailed upon the state legislature to pass an act granting to them the power of eminent domain. Proceeding under the color of authority provided by the act, the Commission

brought a condemnation action in the State Court. The Petitioner brought suit in State Court for an injunction to prevent the Commission from going forward with the condemnation. Although the State Court did grant a temporary injunction in favor of the Petitioner it later dissolved the injunction and refused to issue a permanent injunction.

The Commission went forward with their condemnation action and obtained the property thereby, with Petitioner being awarded $325,000.00 for the property. The Petitioner appealed both of these actions to the Supreme Court of South Carolina, which upheld the lower court. The United States Supreme Court denied Certiorari regarding the decision of the South Carolina Supreme Court.

The present suit was brought in the United States District Court, District of South Carolina, in the Columbia Division. It consists of two causes of action, in both

of which the Petitioner seeks money damages. The Respondents were all members of South Carolina's Tri-Centennial Commission at the time they committed the acts which gave rise to these two causes of action. In each of the causes of action, the Petitioner is suing the Respondents jointly and severally, each in his or her private individual capacity.

The First Cause of Action was brought under the Diversity Jurisdiction of the Court and as a suit arising under the Federal Constitution. The Petitioner is a resident of the State of Florida, and all of the Respondents are residents of the State of South Carolina, and the amount in controversy exceeds the amount of $10,000.00. This cause of action alleges that, in violation of the Federal and South Carolina Constitutions, and therefore without legal authority, the Respondents willfully took the real property of the Petitioner.

The second cause of action is brought as a claim under a Federal statute, 42 U.S.C. 1983, and under the Jurisdictional Provisions of 28 U.S.C. 1343 and of 28 U.S.C. 1331. This cause of action alleges that the Respondents, acting under the color of state law, subjected the Petitioner to the deprivation of rights secured to her by the Constitution and laws of the United States and illegally deprived her of her real property.

The District Court granted Summary Judgment against Petitioner on the grounds that the two state court actions barred the present suit on the doctrine of res judicata. The Court of Appeals for the Fourth Circuit affirmed the Summary Judgment and denied Petitioner's Motion for Rehearing.

REASONS FOR GRANTING WRIT

I. CERTIORARI SHOULD BE GRANTED TO SETTLE THE ISSUE OF "MUTUALITY OF ESTOPPEL" AS THE COURT BELOW UPHELD AN INTERPRETATION OF THE DOCTRINE OF RES JUDICATA INCONSISTENT WITH THE HOLDINGS

OF THIS COURT AND INCONSISTENT WITH THE HOLDINGS OF THE VARIOUS CIRCUIT COURTS OF APPEAL.

The traditional rule as laid down by this Court is that the operation of the doctrine of res judicata must be mutual and that one of the essential elements of the doctrine is that both the litigants must be alike concluded by the judgment, or it binds neither. Bigelow v. Old Dominion Copper Mining and Smelting Co., 225 U.S. 111, 32 S.Ct. 641 (1912). Since the case of Bernhard v. Bank of America National Trust and Savings Association, 19 Cal 2d 807, 122 P. 2d 892 (1942) the issue of mutuality has been greatly unsettled. In that case, Justice Traynor held mutuality not to be a necessary element of the doctrine of res judicata. Since Bernhard, a few Circuits have likewise dispensed with the requirement of mutuality. Graves v. Associated Transport, Inc., 344 F. 2d 894 (4th Cir. 1965). Bruszewski v.

United States, 181 F. 2d 419 (3rd Cir. 1950). Other circuits have required mutuality as held in Bigelow. Grantham v. McGraw Edison Company, 444 F. 2d 210 (7th Cir. 1971).

This Court has addressed the issue more recently in two patent cases. In Triplett v. Lowell, 297 U. S. 38, 56 S. Ct. 645 (1936) this court upheld the requirement of mutuality. However, in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U. S. 321, 91 S. Ct. 1434 (1971) the Court overruled Triplett by saying:

> "Thus, we conclude that Triplett should be overruled to the extent it forecloses a plea of estoppel by one facing a charge of infringement of a patent that has once been declared invalid."

It should be noted that the holding was specifically limited to patent cases and did not encompass the mutuality problem generally. Since the court discussed in great detail the

Bernhard case and the inconsistent applications of the requirement of mutuality subsequently resulting, yet specifically limited abandonment of mutuality to patent cases, it would appear the court affirmed Bigelow in cases of other subject matter.

Mutuality of estoppel is a key issue in the case at hand in that Petitioner was barred below from suing Respondents for money damages, yet the Respondents would not be bound likewise by the prior adjudication. In the original litigation, Petitioner's suit was against the State of South Carolina and the Tri-Centennial Commission as an arm of the State, while in this suit she is suing the individual members of the Commission in their personal, not representative capactities. For the purpose of res judicata, an individual in his representative capactity is regarded as a

different person from the individual in his own personal capacity, and the two are not regarded as being in privity. Deaton v. Gay Trucking Company, 275 F. Supp. 750 (U.S.D.C. 1967). This Court held, in a case involving real property located in South Carolina, that a judgment against an individual claiming to hold as a state officer is not conclusive against the state. Tindal v. Wesley, 167 U.S. 204, 17 S.Ct. 770 (1897). The relationship of the State and one claiming to act as a state officer does not therefore constitute privity between them with regard to the conclusiveness of judgments.

A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity. Restatement Second, Judgments, (Tentative Draft No. 2)Section

80 (2).

The estoppel of judgment must be mutual; unless the party seeking to assert the estoppel is the same party in the first action or in privity with him, the former adjudication does not bind either of the parties in the second suit. This is still the law of South Carolina and the undisturbed holding of Bigelow.

Even the Bernhard definition of "parties" shows Respondents here not to be parties or privies with Defendants in the original litigation. Bernhard defines "parties" to include persons who have a direct interest in the subject matter of the action and have a right to control the proceedings, defend, examine the witnesses, and appeal if an appeal lies. None of the individual Respondents had the ability to perform any of the above of actions in the initial proceedings. Bigelow further defines privity

thusly:

> "Privity is not established, however, from the mere fact that persons happen to be interested in the same question or in proving or disproving the same set of facts, or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action."

Since the Respondents herein are neither parties nor privies in the initial proceedings and since Bigelow still requires mutuality of estoppel, Petitioner's suit should not be barred by res judicata or by collateral estoppel.

The other requirement of res judicata, that the second suit must be on the same cause of action as the first, was also interpreted in a manner inconsistent with the holdings of this Court. This requirement is unique to res judicata and does not

apply to collateral estoppel as does the issue of parties.

There is no identity of the thing sued for in either of the state actions relied on by the Respondents, with the relief now sought by Petitioner. In the condemnation case, the Tri-Centennial Commission sought only to condemn the Petitioner's property. In her suit against the Commission, the Petitioner sought an injunction. In the present case, the Petitioner is suing for money damages, both actual and punitive, under Title 42 U.S.C. 1983 for injury to her occurring after the initial suits. This suit constitutes a new and different cause of action in that it is based on a newly developed fact situation and seeks an entirely different remedy.

Under the Federal Law of res judicata, as well as the State law of South Carolina, a judgment on the merits in a prior suit bars

a second suit only if the second suit was between the same parties or their privies. In determining whether the second suit is based upon the same cause of action as the first, a finding that the second cause of action is based upon facts which did not come into existence until after the adjudication of the first suit precludes the second cause of action from being determined to be the same as the first. Lawlor v. National Screen Service Corp. 349 U.S. 322, 75 S. Ct. 865, 99 L.Ed. 1122 (1955).

In order for there to be an identity of the cause of action, there must be an identity of the facts necessary to sustain the cause of action in each suit. There is no such identity of facts between the Petitioner's present action and the two previous cases decided in state court. The facts necessary to sustain the present suit

include the fact that the Respondents have actually taken the property of the Petitioner, and that as the factual situation has developed, the Petitioner has actually been damaged. As a matter of common law and logic, an adjudication of one cause of action cannot constitute a bar, by reason of res judicata, to a subsequent cause of action which was not even in existence at the time of the said adjudication. Lawlor v.National Screen Service Corp., supra. As the one did not even exist when the other was adjudicated, the two cannot be identical. The Petitioner's cause of action for the damage she sustained by reason of being wrongfully deprived of her property and livelihood did not even exist at the time the two state court cases were decided, and therefore could not have been identical with those causes of action.

II. CERTIORARI SHOULD BE GRANTED TO ALLOW THIS COURT TO DECIDE WHETHER A PROCEEDING IN A STATE COURT CAN BAR REDRESS UNDER 42 U.S.C. 1983.

The Petitioner asserts that the purpose and intent of 42 U.S.C. 1983 is to provide a Federal forum for persons who are under the color of state law denied the rights secured to them under the laws and Constitution of the United States, especially where there is no state remedy or where the state remedies are not adequate. Battle v. Mullholland, 439 F.2d 321 (1971). Under this statute, the federal courts are empowered to provide a remedy supplemental to any state remedy. The state remedies in our situation were not adequate to protect the constitutional rights of the Petitioner. We further urge that if after the decision in the State Court actions the Petitioner was under state law barred from litigating her case against these Respondents, then the Petitioner never had

any state remedy against the Respondents, as the taking of the property, which is the basis of this action, occurred after the State Court actions were rendered.

CONCLUSION

For all the above reasons your petitioner prays that this Honorable Court grant this Writ of Certiorari directed to the Supreme Court of South Carolina and that this Honorable Court establish a briefing schedule towards the ultimate determination of this case.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-2209

Annie Mary Timmons,

Appellant,

v.

Thomas O. Lawton, Jr., et al,

Appellees.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Robert F. Chapman, District Judge.

ORDER DENYING MOTION FOR REHEARING

Upon consideration of the motion for rehearing of the Appellant, now with the concurrance and approval of Judges Craven and Field, the other members of the hearing panel, and in the absence of a request for a poll of the entire court, as provided by Appellate Rule 35(b), it is

ADJUDGED and ORDERED that the said Motion for rehearing be, and it is hereby, denied.

For the Court:
Albert V. Bryan
Senior United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-2209

Annie Mary Timmons,

Appellant,

v.

Thomas O. Lawton, Jr., Mrs. O. T. Smith, Alderman Duncan, Wayne W. Freeman, Mrs. William Close, W. Wright Bryan, Mrs. Laura J. Quattlebaum, Rufus W. Cosnell, George C. Rogers, Jr., Joseph B. McGee, Jr., Dr. Joe M. Lesesne, Thomas E. Thornhill, Dr. Maceo Nance and James M. Barnett,

Appellees.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Robert F. Chapman, District Judge.

(Submitted May 3, 1976

Decided May 26, 1976)

Before Bryan, Senior Circuit Judge, and Craven and Field, Circuit Judges.

(J. Wesley Drawdy, William J. Nicholson on brief) for appellant; Daniel R. McLeod, Attorney General. C. Tolbert Goolsby, Jr., Deputy Attorney General; Karen LeCraft Henderson, Assistant Attorney General on brief) for Appellees.

PER CURIAM:

Appellant Annie Mary Timmons instituted this suit under 42 USCA 1983 (Civil Rights Act) in the District Court against the members of the South Carolina Tricentennial Commission in their individual capacities, alleging with respect to the condemnation of her real property in Charleston, South Carolina, that these members took her property unconsitutionally and deprived her of rights secured by law.

Prior to the present suit, Timmons had sued the South Carolina Tricentennial Commission in the South Carolina State courts with respect to the same condemnation, averring among other things the unconstitutionality of the South Carolina condemnation statutes, procedures and the application of the statutes and procedures to her. The South Carolina Supreme Court affirmed a lower State court in a judgment against Timmons on these accusations. Timmons v. South Carolina Tricentennial Commission, et al. and South Carolina Tricentennial Commission, et al. vs. Timmons, et al., 254 SC 378, 175 SE2d 855 (1970). Review by certiorari of her suit by the United States Supreme Court also was denied, 400 US 986 (1971).

In granting the Appellee's motion for summary judgment, the District Court determined that the instant suit was barred by the doctrine of res judicata, in that Timmons had litigated completely, resulting in an unfavorable decision on substantially the same issues and involving the same parties or their privies as were present in the State court case.

We have reviewed the record before the District Court and find that it properly applied the doctrine of res judicata to the facts before it in dismissing the present suit. Accordingly, the decision of the District Court is affirmed.

AFFIRMED.

APPENDIX C

ORDER

This matter is before the Court upon motion of the defendants for summary judgment and also upon application of the plaintiff to convene a three-judge district court under 28 U.S.C. § 2281 et seq.

This action was commenced by Plaintiff, a citizen of the State of Florida, against the fourteen individual defendants, who were former members of the South Carolina Tri-Centennial Commission (hereinafter referred to as "Commission"). The complaint sets forth two causes of action, but a close examination of the allegations indicate that the causes of action are basically the same. Plaintiff alleges that in 1969 the defendants acting under Joint Resolution R 293, Acts of the General Assembly of 1969, brought an action for condemnation of real property belonging to plaintiff and over the objections of the plaintiff proceeded to acquire the property for use in the celebration of the 300th anniversary of the state of South Carolina, "Which celebration was to be conducted by the above named individuals acting as members of the South Carolina Tri-Centennial Commission or employees thereof." She further alleges that the Act was repugnant to both the Constitution of the State of South Carolina and the Constitution of the United States, and "the condemnation was not for a legitimate purpose, and there was no necessity for such taking which deprived the Plaintiff of her property and livelihood

without due process of law. The taking by means of condemnation involved special legislation aimed solely, directly and exclusively at this plaintiff, and as a result of this condemnation of her properties denied her the rights, privileges and immunities of a Citizen of the United States." She goes on to allege that the defendants were acting "without lawful authority but under color of law" and as a result of these acts she claims Nine Million Dollars damages on the first cause of action. The same allegations appear in the second cause of action, but it also alleges:

> "The actions, activities and proceedings by the Defendants herein were made and done under color of State law and subjected the Plaintiff herein to deprivation of her rights, privileges, or immunities guaranteed to her by the Federal Consitution and the laws of the United States, particuarly 42 U.S.C. Section 1983."

She then demands Six Million Dollars damages as to the second cause of action.

The defendants' answer sets up nine defenses to the first cause of action and eleven defenses to the second cause of action. These defenses are: that the Tri-Centennial Commission is an alter ego of the State of South Carolina, the State and not the individuals are the real party in interest and may not be sued under the Eleventh Amendment to the United States Constitution in this court; that the State has not

consented to this action; that the Court lacks jurisdiction since the State is the real party in interest and there is no diversity of citizenship, since the State is not a citizen within the meaning of 28 U.S.C. § 1332; that the South Carolina Tri-Centennial Commission was abolished by Act No. 610 of the Acts and Joint Resolutions of the South Carolina General Assembly of 1971 and relief against it may not be granted; that the complaint fails to state a cause of action upon which relief may be granted; that the action is barred by res judicata, since the same issues were litigated between the same parties in two actions in the state courts, with a final opinion by the Supreme Court of South Carolina and certiorari denied by the United States Supreme Court; that the plaintiff is collaterally estopped from relitigating the same issues; that the acquisition of Plaintiff's property by the South Carolina Tri-Centennial Commission was performed by the defendants within the scope of their duties under the laws of the State of South Carolina, acting within the range of discretion permitted and in good faith.

The Commission was created by the General Assembly of South Carolina in 1956.[1] The 1956 Act was amended in 1966[2] and again in 1968[3]. The 1968 amendment conferred upon the Commission, not the individual members

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[1] South Carolina Acts & Joint Resolutions 1956, pg. 2194.
[2] South Carolina Acts & Joint Resolutions 1966, pg. 2817.
[3] South Carolina Acts & Joint Resolutions 1968, pg. 3193

thereof, the power of eminent domain, and in the spring of 1969 a suit was filed in the Court of Common Pleas for Richland County, South Carolina, entitled the South Carolina Tri-Centennial Commission and Daniel R. McLeod, as Attorney General for the State of South Carolina, plaintiffs v. Annie Mary Timmons and Home Federal Savings & Loan Association, Defendants. Four days thereafter, Annie Mary Timmons, as plaintiff, in an action against the South Carolina Tri-Centennial Commission and Daniel R. McLeod, as Attorney General for South Carolina, defendants, obtained a temporary injunction restraining the Commission from proceeding with its condemnation action.[1] The two State Court actions were combined on appeal taken by the plaintiff herein from the decision of the lower court in the injunction proceeding and also from a verdict of $325,000.00 obtained in the condemnation proceeding. The South Carolina Supreme Court heard these cases together and in 254 S.C. 378, 175 SE2d 805 (1970) and ruled against Annie Mary Timmons on both appeals. Thereafter, the plaintiff appealed the State Court decision to the United States Supreme Court and this appeal was dismissed for want of jurisdiction and also denied plaintiff review by certiorari. 400 U.S. 986 (1971). Thereafter the United States Supreme Court denied a petition for rehearing by plaintiff. 401 U.S. 949 (1971).

This action does not require the convening

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1 The Attorney General for South Carolina was made a party to the State Court proceedings as required by the enabling amendment of 1968.

of a three-judge district court under 28 U.S.C. § 2281. It is elemetary that to convene a three-judge court the complaint must challenge a state statute or administrative order, a state officer must be a party defendant, injunctive relief must be sought, and it must be claimed that the statute or order is contrary to the Constitution of the United States. Three-Judge Court: See How They Run, 52 F. R. D. 293, 298.

Although there may be some question as to whether the complaint in this action challenges the constitutionality of a South Carolina statute, there is no question as to the failure of the plaintiff to seek injunctive relief or to name a state officer as a party defendant. Plaintiff insists in her brief that the action is against the named defendants as individuals and not as officers or representatives of the State. The present suit seeks only monetary damages against these former members of the Tri-Centennial Commission, which went out of existence long before the present action was commenced.

Plaintiff is not entitled to have a three-judge court hear this caus and her motion for the same is denied.

In the State Court proceedings Timmons raised the following points:

"1. There is no necessity for the condemnation;

2. The Condemnation does not result in a permanent taking of the property;

3. The taking does not involve a public use of the property as required in eminent domain proceedings;

4. The statutes are discriminatory and deny the landowner due process and equal protection of the laws;

5. The legislative enactments under which the Commission is proceeding are special legislation prohibited by Article 3, Section 34, Subsection 9 of the South Carolina Constitution;

6. The legislative enactments do not grant express authority for the condemnation and are defective."

The decision of the South Carolina Supreme Court answered each of these questions against Timmons. It is obvious that Plaintiff now wishes to relitigate the same questions in this Court, seeking to come under the broad umbrella of 42 U.S.C. § 1983. This cannot be permitted. In Bricker v. Crane, 468 F. 2d 1228 (1st Cir. 1972) the Plaintiff was a physician who was not reappointed to the medical staff of Sceva Speare Memorial Hospital. He brought an action in the State Superior Court for injunctive relief against the hospital seeking readmission to the staff. Bricker vs. Soeva Speare Memorial Hospital, N.H., 381 A.2d 589, Cert. den'd U.S. 995 (1971). After denial of his petition for writ of certiorari, Dr. Bricker commenced an action in the United States District Court naming as defendants members of the staff and executive committee of the hospital, several

insurance companies and attorneys alleging a conspiracy to deprive him of his constitutional rights. The District Court dismissed the action and this was affirmed by the First Circuit, which stated at page 1231:

> "In P.I. Enterprises, Inc. v. Cataldo, 457 F. 2d 1012 (1st Cir. 1972), this Court held that the effects of collateral estoppel cannot be avoided by recasting an adjudicated issue in the form of an action under the Civil RIghts Act. We noted in that decision the well settled principle that State Courts are fully empowered to decide federal claims and that '(A) State Court decision in constitutional issues is res judicata to the identical suit brought in Federal Court. Id at 1014. We reiterate that the Civil Rights Act is not a vehicle for collateral attack upon final State Court judgment, Coogan v. Cincinnati Bar Association, 431 F. 2d 1209 (6th Cir. 1970); Rhodes v. Meyer, 334 F. 2d 709, 716 (8th Cir.) cert. den'd 379 U. S. 915, 85 S. Ct. 263, 13 L. Ed. 2d 186 (1964), and that a writ of certiorari to the United States Supreme Court is the only method by which such a decision may be reviewed. See Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). In the present case, appellant unsuccessfully sought such review after voluntarily litigating his federal claims in the State Court. Understandably disappointed with the outcome of this earlier litigation, he now seeks a happier result in a Federal

forum. But he is not entitled to an 'encore'.[6] Angel v. Bullington, 330 U.S. 183, 191 67 S.Ct. 657, 91 L. Ed. 832 (1947)."

Footnote 6 to the Bricker opinion states:

"Appellant seeks to distinguish our decision in P. I. Enterprises by arguing that his constitutional claim was not, in fact, decided by the State Courts. He reaches this somewhat startling conclusion by characterizing the New Hampshire Courts' determination of the State action question as decisive only of a prelimary injunction issue. It is, of course, crystal clear that a due process violation can never exist in the absence of state action, and that appellant's contention is, therefore, frivolous."

The Bricker Court also refused to allow the Plaintiff to proceed under 42 U.S.C. § 1985 covering conspiracy since the complaint failed to meet the minimum requirements for stating such a cause of action, and no such cause of action is stated by Timmons in the present case.

In Coogan v. Cincinnati Bar Association, supra, the plaintiff was indefinitely suspended from the practice of law by the Supreme Court of the State of Ohio and brought an action under 42 U.S.C.§ 1983. In dismissing the action the Sixth Circuit stated:

" The Civil Rights Act was not designed to be used as a substitute for the right of appeal, or to collaterally attack a

final judgment of the highest court of the State and relegate the issues which it decided.

The final judgment of the Supreme Court is conclusive and Coogan is precluded by the doctrine of res judicata from relitigating not only the issues which were actually involved in the disbarment proceedings, but also the issues which he might have presented."

Under the doctrine of res judicata a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies. Lawlor vs. Nat'l Screen Service Corp. 349 U.S. 322 (1955). It is obvious that there is privity between the Commission and the individual members thereof and plaintiff's present action is brought in an effort to relitigate anew the issues which have already been decided in the prior action.

Timmons contends that she may not be barred from proceeding in the United States District Court because of a prior adjudication against her proceeding in the State Court, citing England v. Louisiana Medical Examiners, 375 U.S. 411 (1964). However, the England case involved an action which was originally brought in the United States District Court involving a question of state law. The Federal Court, invoking the doctrine of abstention, stayed its proceedings until the Louisiana State Court had decided the issue. After the State Court had decided the issue contrary to England's position, he came back to the United States District Court, which dismissed the action stating that all issues had been raised and decided by the

Louisiana State Court. In reversing this decision the United States Supreme Court stated:

> "There are fundamental objections to any conclusion that a litigant who has property invoked jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a State Court's interpretations of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon Federal Courts, and with the principle that 'when a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is his duty to take such jurisdiction... The right of a party plaintiff to choose a Federal Court where there is a choice cannot be properly denied."

Obviously, England originally sought relief in the Federal Court and was sent to the State Court. In the present case Timmons originally sought relief in the State Court and thereafter appealed the State Court decision to the highest court in the land. Now she is only attempting to relitigate the matter or seeking an "encore".

IT IS, THEREFORE, ORDERED that Plaintiff's motion for convening a three-judge court be and the same hereby denied, and

IT IS FURTHER ORDERED that this action be and the same is hereby dismissed.

AND IT IS SO ORDERED.

September 9, 1976 ROBERT F. CHAPMAN

JUDGMENT

This action came on for hearing before the Court, Honorable Robert F. Chapman United States District Judge, presiding, and the Defendant's motion for summary judgment having been duly heard and a decision having been duly rendered,

It is ordered and adjudged that Plaintiff, Annie Mary Timmons take nothing of Defendants, Thomas O. Lawton, Jr., Mrs. O. T. Smith, Alderman Duncan, Wayne W. Freeman, Mrs. William Close, W. Wright Bryan, MRs. Laura J. Quattlebaum, Rufus W. Cosnell, George C. Rogers, Jr., Joseph B. McGee, Jr., Dr. Joe M. Lesesne, Thomas E. Thornhill, Dr. Maceo Nancy, and James M. Barnett, and the action be dismissed.

MILLER C. FOSTER, JR.
Clerk of Court

by; Linda N. Richardson
Deputy Clerk

Dated at Columbia,
South Carolina, this
9th day of September,
1975.

APPENDIX D

THE STATE OF SOUTH CAROLINA

In the Supreme Court

Annie Mary Timmons,..... Appellant,
v.
The South Carolina Tri-
Centennial Commission and
Daniel R. McLeod, As Attorney
General for the State of
South Carolina..... Respondents,
and
The South Carolina Tricentennial
Commission and Daniel R. McLeod,
as Attorney General for the
State of South Carolina,... Respondents,
vs.
Annie Mary Timmons and Home
Federal Savings and Loan
Association, of Whom Annie
Mary Timmons is,..... Appellant.

Appeal from Richland County, John Grimball and George Bell Timmerman, Jr., Judges

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Opinion No. 19074
Filed July 7, 1970

AFFIRMED

N. Welch Morrisette, Jr., and William H. Gibbes, of Berry, Lightsey, Gibbes & Bowers, of Columbia, for appellant in Timmons v. South Carolina Tricentennial Commission.

Arthur T. Cole, of Columbia, for appellant in South Carolina Tricentennial Commission v. Timmons.

Augustus T. Graydon, of Graydon & Suber; and Attorney General Daniel R. McLeod and Assistant Attorney General Everett N. Brandon, all of Columbia for respondents.

LITTLEJOHN, A. J.: The South Carolina Tricentennial Commission, a State agency created by the General Assembly for the purpose of commemorating the 300th birthday of the State, brought an action against Annie Mary Timmons, a landowner, for the purpose of acquiring through the power of eminent domain a parcel of her real estate for use incident to the tricentennial celebration. In this case she is represented by Arthur T. Cole. We refer to this action as the condemnation proceeding.

Annie Mary Timmons brought an action against South Carolina Tricentennial Commission and against Daniel R. McLeod, as attorney general, under the Uniform Declaratory Judgment Act, seeking an injunction preventing acquisition of the property. In this case she is represented by N. Welch Morrisette, Jr., and Messrs. Berry, Lightsey, Gibbes and Bowers. We refer to this action as the injunction proceeding.

The injunction proceeding was tried in equity before Judge Grimball, resident Judge of the Fifth Judicial Circuit, and resulted unfavorably to the landowner.

Thereafter, the condemnation proceeding was tried before Judge Timmerman and a jury, resulting in a verdict for $325,000 in favor of the landowner.

The landowner, through respective counsel, has appealed in each case. Such appeals were argued together before this court and are ripe for our determination. We consider first,

THE INJUNCTION PROCEEDING

We have carefully studied each of the questions raised by counsel for the appellant as relates to whether an injunction should have been issued. We observe that the same questions were clearly presented to Judge Grimball, and from a study of his order we conclude that he correctly set forth and disposed of all of the issues raised on this appeal. The order of Judge Grimball shall be printed as the opinion of this court, except that paragraph 4 at folio 531 and subsequent paragraphs of the order (relating to matters of no concern on this appeal) will not be included.

ORDER OF JUDGE GRIMBALL

Annie Mary Timmons is the owner of a lot in the block of land in which the Columbia Exhibit Center is being erected for South Carolina's Tricentennial celebration in 1970. All other properties in the block have been acquired by the South Carolina Tricentennial Commission by purchase. In May of 1969, a joint resolution of the General Assembly gave to the South Carolina Tricentennial Commission the power of eminent domain.

On June 6, 1969, a suit was filed in the Clerk's Office of this Court seeking to condemn this lot of Miss Timmons. On June 10, 1969, pursuant to a verified complaint presented to the Court on behalf of Miss Timmons, a temporary injunction was granted restraining the South Carolina Tricentennial Commission from proceeding in its condemnation action. A hearing on the issues raised in the landowner's suit (no. 3650) was set for August 13, but the hearing on the merits in that suit was delayed until August 19, when the landowner sought a continuation of the temporary injunction.

The hearing on August 19 was confined to the issues raised in the landowners' complaint in which she seeks a permanent injunction enjoining any proceedings to condemn her property. Upon a petition from Commission's counsel, this Court modified that temporary injunction to allow the Commission to file certain motions of a pre-trial nature in the condemnation action; those matters are not for consideration at this time.

The Court will, however, comment hereinafter on the Commission's motion for consolidation of the two proceedings without making a final ruling on that motion. That matter, along with other issues not raised in the landowner's proceeding, will be heard at a time set out in this order.

The landowner in her proceeding is testing the validity of the condemnation iteself and the enactments under which the condemnation proceedings have been instituted.

The Commission's counsel has stated the points raised by the landowner in that proceeding as follows:

1. There is no necessity for the condemnation;
2. The Condemnation does not result in a permanent taking of the property;
3. The taking does not involve a public use of the property as required in eminent domain proceedings;
4. The statutes are discriminatory and deny the landowner due process and the equal protection of the laws;
5. The legislative enactments under which the Commission is proceeding are special legislation, prohibited by Article III, Section 34, Subsection 9 of the South Carolina Constitution;
6. The legislative enactments do not grant express authority for the condemnation and are defective.

At the hearing, the landowner testified as to her acquisition and development of the property, but none of her testimony related to the issues raised by her pleadings except the statement that the tract had no historical significance. Her counsel relied on the enactments creating the Tricentennial Commission and defining its powers and two letters relating to the enactment of the measure giving the Commission the power of eminent domain.

The Commission's witnesses testified as to the historical and architectural importance of the house and surrounding

block, the proposed use of the property as the site for the Columbia exhibit center during the Tricentennial celebration, the projected use of the property after 1970 and the permanent character of the taking. In connection with the latter testimony, the contract between the Commission and HUD and the enactment by the General Assembly of South Carolina in regard to the use of the property were introduced. Other exhibits relating to this property, its acquisition and use were placed in evidence.

I will now consider and rule on the various points raised by the pleadings and at the hearing. The testimony and exhibits relate principally to the necessity for the taking, the permanent nature of the taking and the public use of the condemned property. A letter offering contain testimony relating to the issue of special legislation was received in the Court subsequent to the hearing and will be considered in that part of this Order.

The six issues will be dealt with in the Order set out above.

(1) The necessity for the Condemnation.

In the law of eminent domain, it is well established that there must be a necessity for the taking, but this does not mean an absolute necessity, but rather a reasonable necessity. Seabrook v. Carolina Power and Light Company, 159 S.C. 1, 156 S.C.1. Our Supreme Court said in White v. Johnson, 148 S.C. 488, 146 S.E. 411, 412:

> "It is well established law that necessity, as well as public use, must always exist in order to warrant the taking of lands,

through condemnation, by a grantee of the power of eminent domain. The delegation of the right to exercise that power carries with it the implied condition that it shall be exercised only to the extent found necessary.

"As to what it meant, in this connection, by the term 'necessity', we find the following in 20 C.J., at page 630: "Necessity*** does not mean an absolute but only a reasonable necessity, such as would combine the greatest benefit to the public with the least inconvenience and expense to the condeming party and the property owner consistent with each benefit***'."

This block will be used as a site for a historical exhibit during 1970 and thereafter as a public park or garden and historic site. The block is the site of the Hampton-Preston house, an antebellum mansion in which the Hampton and Preston families lived prior to and during the Civil War. The house is being restored, and the gardens which were laid out over the entire block are to be replanted after the Tricentennial celebration.

The validity of condemnation for parks, public squares, historical sites or monuments has been established in many instances. The landowner complains that her properties are to be used for parking purposes, but that, too, is a recognized use for which lands can be condemned. Condemnations for ornamental or beautification purposes are recognized as necessary uses in several jurisdictions.

This use is clearly appropriate and fitting for the purposes for which the land is being condemned, and that is the test on the issue of necessity. This determination has been made by the Commission, and, unless the landowner can show that acquisition of this land is not reasonably necessary and is an abuse of discretion, the Court will not interfere.

The record before me establishes that the acquisition of this parcel (as well as all other parcels in this block), is reasonably necessary and in the interest of the public.

This taking is therefore necessary within the meaning of the law of eminent domain, and there is no basis for enjoining the condemnation on this ground.

(2) The Permanent Nature of the Taking.

Landowner contends that the taking is not permanent because the South Carolina Tricentennial Commission will terminate on January 1, 1972, under the terms of the enactments by which it has been created by the General Assembly.

The Commission has been delegated the power of eminent domain, and the condemnation proceedings have been instituted to acquire the fee simple title to the lot of this landowner. That power was expressly granted to the Commission by the joint resolution of the General Assembly adopted in May of 1969. Joint Resolution R.293, Acts of the General Assembly of 1969.

Prior to that enactment the General Assembly provided that lands acquired with funds of the United States Department of Housing and

Urban Development (HUD) under Title VII of the housing act as amended upon the termination of the Commission "Shall be turned over to the State or such other governmental entity as the General Assembly may direct, to be preserved and used for park purposes."

Acts of the General Assembly of South Carolina, 1968 No. 1384 Amending Act No. 925 of 1956, as amended. This lot is subject to these provisions since HUD funds will be used in the acquisition.

The title being acquired in a condemnation proceeding is determined by the pleadings; the Petition and Declaration of Taking in this case contemplate a fee simple title being acquired from the landowner.

The subsequent abandonment of the original purpose for which the lands were taken would not affect the validity of the condemnation. "The validity of title is determined by the conditions existing at the time of the taking." Higginson v. United States, C.C. A. 6, 384 F.2(d) 504. But here the state and its delegated agency are precluded from any use of this property other than a permanent one by virtue of the contract with HUD and the act enacted pursuant to that contract.

The taking in this instance is therefore a permanent one; even though the Commission will terminate in 1972, the property will remain vested in the state--just as much so as the state highways, the property of state universities or the lands of numerous

commissions and agencies created by the General Assembly. The tract in this instance is being condemned by the state itself and will be preserved as a park.

The taking is permanent in nature, and there is no basis for an injunction on the grounds that the taking is for a temporary use.

(3) The Public Use in This Taking.

The landowner contends that the taking does not involve a public use of the property. Lands cannot be condemned for other than a public use of the same. The meaning of that term as applied in the law of eminent domain must therefore be ascertained.

The term public use is an elastic one and must keep abreast of changing social conditions, and the question is one of fact in each particular case. Gasque v. Town of Conway, 194 S.C. 15, 8 S.E. (2d) 871. "From the nature of the case, there can be no precise line. The power requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever-increasing necessities of society. The sole dependence must be on the personal wisdom of the sovereign authority, supervised, and in cases of gross error or extreme wrong controlled by the dispassionate judgment of the Courts." Olmstead vs. Camp, 33 Conn., 532, 551, 89 Am. Dec. 221.

In Riley v. Union Station Co., 71 S.C. 457, 461, 51 S.E. 485, our Supreme Court confirmed a Circuit Court decree which used this

language:

> "What constitutes a public use? 'The term public use is flexible and cannot be confined to public use known at the time of framing the Constitution. All improvements that may be made, if useful to the public, may be encouraged by the exercise of eminent domain. Any use of anything which will satisfy a reasonable public demand for facilities of travel, for transmission of intelligence or commodities, would be public use." Trenton, etc. Turnpike Co. v. American, etc., Commercial News Co., 43 N.J.L. 384***

In Edens v. City of Columbia, 228 S.C. 563, 91 S. E. (2d) 280, 282, our Court said:

> "***In still other states the power of eminent domain may be exercised for a public purpose, benefit or the public welfare, as contrasted with the requirement of our constitution that it be for a public use. Redevelopment Agency, etc. v. Hayes, 1954, 122 Ca. App. (2d) 777, 266 P. (2d)105; Schenck v. City of Pittsburgh, 1950, 364 Pa. 31, 70 A. (2d) 612; State ex rel. Bruestle v. Rich, 1953, 159 Ohio St. 13, 110 N.E. (2d) 778; Nashville Housing Authority v. City of Nashville, 1951, 192 Tenn. 103, 237 S.W. (2d) 946; Velishka v. City Nashua, 1954, 141 Conn. 135, 104 A. (2d) 365, 368."

From the last cited we quote:

> "In this state (Connecticut) it is settled that public use means public usefulness,

> utility or advantage, or what is productive of general benefit, so that any appropriating of private property by the state under its right of eminent domain, for purposes of great advantage to the community is a taking for public use."

A park for the use of the public has long been recognized as a public use. Wright v. Walcott, 238 Mass. 432, 131 N.E. 291, 292, 18 A. L. R. 1242; U. S. v. Dieckman, 101 F. (2d) 421, 424; Johnson v. City of Corpus Christi, 416 S. W. (2d) 504; Johnson City v. Cloniger, 213 Tenn. 71, 372 S.W. (2d) 281. Thus a public use was recognized in a Mississippi case where the land was condemned for pollution control, control of access, public park and picnic areas, and as a wild life sanctuary. Pearl River Valley Water Supply District v. Brown, 248, Miss. 4, 156 So. (2d) 572, 576. As long as the use is of benefit, utility or advantage to the public, the use is a public one within the meaning of the law of eminent domain. Public health, recreation and enjoyment are recognized public uses. Rindge Co. v. Los Angeles County, Cal., 262 U.S. 700, 43 S. Ct. 689, 67 L. Ed. 1186.

Even though the lands could not be adapted for use as a park, the taking of a portion of the palisades on the Hudson River adjoining a state park for the purpose of preserving the scenic beauty of the river and of the park was for a "public use". Bunyan v. Commissions of Palisades Interstate Park, 153 N.Y.S. 622, 627, 167 App. Div. 457.

Parking, not a problem in most areas before the advent of the automobile, is now a recognized public use for which properties may be condemned. City of Richmond v. Dervishian, 190 Va. 398, 57 S.E. (2d) 120, 124. The fact that such a parking area would benefit nearby stores did not prevent the condemnation for a "public use." Even though a public parking area might be of special benefit to private individuals, off-street parking facilities in public ownership constitutes a "public use" in an eminent domain proceeding. Ermels v. City of Webster City, 246 Iowa 1305, 71 N.W. (2d) 911, 912.

The condemnation of a site of historical significance, such as the Star Spangled Banner Flag House has been recognized as a public use. Flaccomio v. Mayor and City Council of Baltimore, 194 Md. 275, 71 A. (2d) 12, 14. Preserving and marking the site of the Battle of Gettysburg was held to be a public use of lands and therefore subject to condemnation. U. S. v. Gettsburg Electric R. Co., 160 U.S. 668, 16 S. Ct. 427,429, 40 L. Ed. 576. So also the taking of lands for a memorial to the sailors of Salem, Mass., was for a public use in the constitutional sense. In re opinion of the Judges, 297 Mass. 567, 8 N.W. (2d) 753.

The landowner contends that there is no public use in this taking and cites the case of Edens v. Columbia, 228 S.C. 563, 91 S.E. (2d) 280 and Tuomey Hospital v. Sumter, 243 S.C. 544, 134 S.E. (2d) 744, in support of that position. Both of those cases involved condemnation for private uses; here

the use is a public one, for a public purpose and of public benefit.

In Edens, the lands were being condemned for clearance of a slum area and resale to private persons or corporations for commercial and industrial development. The Court properly held that this was a condemnation for a private use. No such plan is involved here; in fact, the contract by which the lands are being acquired with HUD funds and the legislative enactment specifically restrict the use of the property indefinitely to public park purposes.

In Tuomey Hospital, the establishment which sought the protection of public use was an eleemosynary hospital corporation created under a will; the court held that a factual issue as to the public or private nature of the hospital had to be resolved at trial. There is no question about the status of The South Carolina Tricentennial Commission; it is a public body, a part of the State of South Carolina itself.

That the uses for which this property, along with other sites for the Tricentennial exhibits, are being taken are public purposes was recognized in the case involving the bond issue with which these lands in part are being purchased. Historical and recreational purposes are recognized public uses. See Mims v. McNair, _____ S.C. _____, 165 S.E. (2d) 355, 363.

Nothing in this record shows that this property is being taken for any private use; in fact the contract with HUD and the

legislative enactment of 1968 preclude anything save a public use of the block, including the lands of this landowner. In most cases there are no such stringent requirements, but here there can be no use of this property other than a public use.

This lot is being taken for a public use under the specific enactments of the General Assembly; any private use of the property would be in direct contravention of the legislative direction.

The taking of this property is for a public use, and there is no basis for granting an injunction on this grounds.

(4) No Denial of Constitutional Protections in this Proceeding.

The landowner is being afforded the protection and rights guaranteed her by the Constitutions of the United States and South Carolina.

If the taking of property under eminent domain proceedings accords the landowner a reasonable opportunity to be heard on the question of damages, then the essentials of due process are met. The Courts, in an eminent domain proceeding, are not concerned with the wisdom of the law granting the power of eminent domain. 26 American Jurisprudence (2d) p. 647, 661 Eminent Domain No. 8 and No. 19.

As far as due process and equal protection of the laws are concerned, no particular procedure is guaranteed. The constitutional requirements are satisfied if the condemnee has:

(1) Reasonable notice,
(2) Reasonable opportunity to be heard and present the claim or defense, and
(3) Reasonable compensation for the property taken. 27 American Jurisprudence (2d) p. 242 Eminent Domain No. 376.

Whether there is a necessity, a permanent taking or a public use are primarily legislative questions, and there is a presumption that the use contemplated is a necessary, permanent and public one. The burden would be upon the landowner to show that the public use is a sham and a fraud. 27 American Jurisprudence (2d) p. 283. Eminent Domain No. 403.

If there is no necessity for the use or the condemnation proceeding's purpose is to cloak some sinister scheme, then the courts may interfere with the taking, but there is no showing of that kind here. There has been no abuse of the legislative power in this case on the matter of the necessity, permanent taking or public use of the property.

If the trial accords the landowner the guarantee of adequate compensation under equitable rules, then the requirements of due process are met. That will be done by the procedure prescribed for this taking.

I have already ruled on the matters which might deny the landowner due process and the equal protection of the laws; there is no basis for an injunction on these grounds.

(5) The Legislative Enactment Giving the Power of Eminent Domain to The Tricentennial Commission as General Legislation.

Landowner attacks that the legislation as special legislation prohibited by the South Carolina Constitution on two grounds:

(1) The Public Works Eminent Domain Law, which excludes several counties from its effect, is unconstitutional.
(2) The legislative enactment granting the power of eminenet domain is special legislation since in practice it applies only to this landowner.

As far as the issue of special legislation in regard to the Public Works Eminent Domain Laws is concerned, the case of University of South Carolina v. Mehlman, 245 S.C. 180, 139 S.E. (2d) 771, disposes of this issue. Mehlman contended that the Public Works Eminent Domain Laws was special legislation because it excluded seven counties from its provisions. In that case, I held that this law was void and unconstitutional, but the Supreme Court refused to pass on that issue. Instead the court held that the General Assembly merely prescribed the manner in which the University was to exercise the power of eminent domain.

The statute, according to the Court's decision, incorporated by reference those parts of the Public Works Eminent Domain Laws which are general in nature. Since this did not include those special provisions excluding certain counties the general provisions only applied and the University's power of eminent domain was upheld.

The same reasoning applies to the enactments which gave the Tricentennial Commission the power to condemn. The Joint Resolution merely prescribed the manner in which the power is to be exercised -- that is, in accord with the general statutory procedure set out in Chapter 3, Title 25 of the Code. The language used is "in the manner prescribed ...."

The Mehlman case is directly in point and is the basis for holding that the enactment is not special legislation. There is no basis for a holding that the provision excluding certain counties in the Public Works Eminent Domain Act constitute special legislation, for this provision is not a part of the procedure prescribed in granting the exercise of the power of eminent domain to this Commission.

(2) The legislation is general in its terms and application and the fact that it may only be invoked on account of one landowner would not make this special legislation.

On the question of special legislation, the Supreme Court said in Elliott, et al., v. Sligh, 223 S.C. 161, 103 S.E. (2d) 923:

> "***The fact that legislation is expressed in general terms is not controlling. A law general in form but special in its operation, violates a constitutional inhibition of special legislation as much as one special in form. The question must be decided not by the letter, but by the spirit and practical operation of the act.

Town of Forest Acres v. Town of Forest Lake, 226 S.C. 349, 85 S.E. (2d) 192."

The legislation in Elliott prohibited the sale of fireworks "in a county containing a municipality having a population of over sixty five thousand inhabitants accordingly to the last official United States census." Only Richland and Charleston counties were affected. The law was attacked as special legislation prohibited by Article III, Section 34, subdivision 9 of the South Carolina Constitution. The Court said in Elliott (233 S.C. p. 165):

"All considerations involving the wisdom, policy or expediency of an act are addressed exclusively to the General Assembly. We are only concerned with the power of that body to enact a law. Every presumption will be made in favor of the constitutionality of a legislative enactment. But when the unconstitutionality of an act is clear to this court, beyond a reasonable doubt, then it is its plain duty to say so, Thomas v. Macklen, 186 S.C. 290, 195, S.E. 539."

Holding that a population classification has "no natural or logical relation" to the purpose of the fireworks statute, the Supreme Court in Elliott held that a general law applicable to the whole state was proper and that the special act was therefore unconstitutional.

In the Forest Acres case, the same rule applied as in the Elliott case: although general in terms, the legislative enactment applied only to counties containing a city of over 85,000 in the 1950 census. Only

Richland County fitted into this category. The Court held that the classification was arbitrary and that this fact made this special legislation since by its express terms it applied to only one county and four small municipalities in that county which could have been annexed.

There are no limitations in the legislation which granted this power to the Tricentennial Commission. The fact the funds have been appropriated for acquisition of lands only in Charleston, Richland and Greenville counties is not determinative of the issue. The General Assembly could have appropriated funds for projects in all 46 counties. The grant of power is in no way restricted. There are therefore none of the evils of special legislation.

The power being general in its terms and general in its application, this is not special legislation and does not smack of the evil at which the constitutional prohibition was aimed. As Elliott shows, the purpose of the provision is to prevent the legislature "in its wisdom" from creating 46 different county governments or penalizing some particular counties.

The evil at which the constitutional provision against special legislation was aimed resulted from "legislation by delegation." As the Court said in Tisdale v. Scarborough, 99 S.C. 377, 83 S.E. 594:

"***That kind of legislation (i.e., special legislation) was deemed pernicious; it

lacked the settled consideration and consent of the lawmaking body; it evaded state-wide responsibility; it encouraged local activity; it discouraged the attrition of minds and the consideration of those problems which make for a wise public policy***".

The fact that the enactment only affects one person or one locale does not make the act special legislation. Spitcanfsky v. Hatten, 353 Mo. 94, 182 S.W. (2d) 86, 160 A.L.R. 990, 1021.

In Eyess Woolen Co. v. Gilsum, 146 Atl. 511, 64. A.L.R. 1196, the New Hampshire Court held that a statute exempting a particular private corporation from taxes was improper, where a general law would have been appropriate. As long as a law operates uniformly, it is not obnoxious to a constitutional provision against special legislation. People v. Wood, 391 111, 237, 161 A.L.R. 718, 62 N.E. (2d) 809. The fact that a particular law would apply to only one city where a population basis was provided would not make that law special legislation. State of Iowa v. Darling, 246 N.W. (Iowa) 390, 88 A.L.R. 218.

The designation of the highways to be paved in a particular county contravenes the prohibition against special legislation. Knight v. Hollings, 242 S. C. 1, 129 S.E. (2d) 746. A bill to provide for appointment of members of forestry board of a particular county was unconstitutional where there was a general statute providing for such appoint ments. McElveen v. Stokes, 240 S. C. 1, 124 S.E. (2d) 592.

The case of Elliott v. Cass, 241 S.C. 96, 127 S.E. (2d) 206, involved an attempt by the City of Greenville to allow the construction by private individuals of a motor vehicle parking building over a public street. The city issued a permit for that purpose, and in 1959 that action was enjoined. An act limiting the population bracket to Greenville was vetoed by the Governor in 1960 as special legislation, and an act general in form was held unconstitutional where the act allowed the private owners "to encroach over a State Highway in the construction of a private business building and that this privilege is denied to any and all other persons." (Ellison v. Cass, supra, 241 S.C. at page 101.)

The case of Thomas v. Macklen, 186 S.C. 290, 195 S. E. 539, cited in the Cass case, involved a statute prescribing incorporation of "resort communities". The Supreme Court held that act invalid because there was no reasonable basis for the special legislation enacted which was passed to apply to Myrtle Beach.

After the hearing and testimony were completed, the landowner's attorneys in connection with the submission of their reply brief asked the Court to consider certain additional evidence which was "discovered" after the hearing on the merits. That testimony consists of statements made before the Judiciary Committee of the House of Representatives of the General Assembly during a hearing on the proposed legislation granting the power of eminent domain to the South Carolina Tricentennial Commission.

The members of that committee, according to this offer of testimony, would have testified that the executive director of the Commission advised the committee "That the power requested by the Tricentennial Commission of eminent domain was only to be used in Columbia, South Carolina***" and that "its use was not anticipated elsewhere."

These witnesses, according to the landowner's attorneys, would also testify that this assurance "expressed the intended purpose of the legislation and was necessary for its approval by the committee."

Counsel for the Commission has objected to the offer of all such testimony on the grounds that testimony at the hearing is irrelevent in the absence of an ambiguity in the enactment and additionally that the testimony as to the purpose and circumstances of the approval of the enactment consists of conclusions on the part of the witnesses.

While this testimony is not properly before the Court and a complete legislative history might reveal other testimony as to the purposes and course of this legislation's passage, I am considering the same in order to prevent any further delays in the consideration of the issues before the Court on the validity of this statute.

If a statute is clear and explicit in its language, then there is no need to resort to statutory interpretation or legislative intent to determine its meaning. The

enactment here is clear, precise and explicit; it grants to this Commission the power of eminent domain to be exercised in the manner prescribed in the Public Works Eminent Domain Statute.

The fact that this enactment is going to be used in only one locale or that it may be used against this landowner only is not determinative of the issue; the statute is general in its application, and it is not directed at any particular person.

The fact that the enactment operates as to only one person is not the test. Had one person or area been excluded from the operation of the statute, that might be fatal, but here the statute has no such exclusions.

Where the language of a statute is doubtful or uncertain in meaning, then the Court can look to the circumstances and conditions existing at the time of its enactment. Abell v. Bell, 229 S.C. 1, 91 S.E. (2d) 548. But where the language is clear and explicit, the courts cannot rewrite the statute and inject matters into the statute which are not in the legislative language. United States v. Shirah, C.C.A. 4, 243, F. (2d) 798, 800.

Legislative enactments are to be construed as they are written, and, unless there is an ambiguity in the legislation, resort to statements by members of a committee will not be considered in construing a particular piece of legislation. 50 American Jurisprudence pps. 326-328, Statutes Nos. 335-337.

As our Court said in Abell v. Bell, 229 S.C. 1, 4, 91 S.E. (2d) 548:

"If the intent of the legislature be clearly apparent from its language, the court may not embark upon a search for its dehors the statute.***
"But where the language of the statute gives rise to doubt or uncertainty as to the legislative intent, the search for that intent may range; for it must be gathered from a reading of the statute as a whole in the light of the circumstances and conditions existing at the time of its enactment.***"

Nothing is required to interpret or construe the legislative enactment which gave this Commission the power of eminent domain. The grant of power is complete, plain, and unambiguous. Legislative intent in such a case is to be determined from the language employed; legislative history only can be resorted to for the purpose of solving doubt, not for the purpose of creating it.

This being the case, I hold that this is not special legislation and that the act is constitutional.

(6) The Enactment Granting the Power of Eminent Domain Not Defective.

The enactment granting the power is specific and clear; that the legislature can delegate the power of eminent domain to subsidiary agencies is settled.

The landowner complains because the joint resolution granting the power of eminent domain only referred to the resolutions of 1956 and 1966 in its title and referred to

the 1956 act "as amended". Even if this title reference alone is considered, that would not destroy the validity of the statute because it is the section adopted in 1966 which is being amended.

The body of the resolution uses the simple language "as amended,"in referring to the original (1956) resolution, and this would certainly include all subsequent enactments.

The landowner contends that because the express statute was not referred to in the enacting phase (Act No. 1141, 1966), the enactment is defective. The answer is:

(1) The particular enactment being amended (no. 1141, 1966) was referred to specifically in the title,
(2) The express section being amended was specifically quoted, and
(3) There is no difficulty in determining the amendments to the original (1956) act.

The express wording of the statute shows that the General Assembly in explicit and clear language gave to the South Carolina Tricentennial Commission the power of eminent domain.

The legislative enactments (other than appropriations bills and bond enactments) show the present status of the 1956 act, as amended in 1966, 1968, and 1969. Wherein there is a defect is not apparent to the Court.

The act as enacted is clear and specific,

and the legislative authority for the proceedings in eminent domain has been specifically granted by the General Assembly.

Accordingly there is no basis for holding the act defective.

It is therefore ordered:

1. That the temporary injunction enjoining condemnation proceedings against Annie Mary Timmons is hereby dissolved;
2. That the prayer for a permanent injunction is denied;
3. That the Complaint of the Landowner in Docket No. 3650 is dismissed.

We now consider,

THE CONDEMNATION PROCEEDING

The landowner filed ten exceptions alleging error on the part of the lower court and asked that a new trial be granted. Such exceptions are reduced to four questions as set forth in appellant's brief as follows:

QUESTION I

"Did the trial judge err in abusing his discretion by refusing appellants motions for a continuance and should he have granted appellant a new trial by reason thereof?"

The condemnation proceeding was commenced June 6, 1969. The injunction proceeding was commenced four days later. Service of the condemnation proceeding was effected after the process server made 42 trips to the

apartment of Miss Timmons. She denied that she was ever served, but the trial judge found as a fact that service had been brought about. After an order had been filed denying an injunction in the injunction proceeding, the landowner, about October 1, employed Owen T. Cobb, Jr., of the Columbia Bar to represent her in the condemnation case. He appeared for her at a deposition hearing October 24, 1969, and on November 12, 1969, appeared in this court asking a stay of proceedings, which was denied. Mr. Cobb and Miss Timmons could not agree upon a contract for legal services and the trial court relieved him as counsel on November 20, 1969. Simultaneously, the court set a pretrial conference on November 25, 1969, and set the trial for December 1, 1969. On November 19, 1969, she employed Mr. Cole, is now her counsel, and he appeared in the case for the first time at the pretrial hearing November 25.

On December 1 Mr. Cole moved for a continuance based on a certificate of an intern of the Aiken County Hospital emergency room dated November 29, 1969, and a certificate of a medical doctor in Columbia at the emergency room on the morning of December 1. Each certificate indicated that Mr. Cole had an upper respiratory infection. The motion was overruled and the case proceed to trial, consuming a total of five days. Mr. Cole participated in the case, and on December 8 appeared to move for a new trial.

The matter of a continuance is addressed to the discretion of the trial court; such a ruling will not be disturbed unless manifestly erroneous. Boston v. Home Insurance

Company of New York, 191 S.C. 314, 4 S.E. (2d) 261. Neither of the statements indicated that Mr. Cole's health would be impaired by a courtroom appearance. No further showing of inability to try the case was made during the five day proceeding. We find no abuse of discretion.

QUESTION II

"Did the trial judge err by admitting evidence over the objections and/or motions to strike of appellant's counsel and should he have granted appellant a new trial by reason thereof?"

The admission of evidence is largely a matter of discretion of the trial judge. In order for this court to reverse a case based on the erroneous admission or erroneous exclusion of evidence the plaintiff must show error and prejudice. The testimony is not printed as a part of the transcript of record; we cannot find in the record before us basis for holding that there was such an abuse of discretion as to warrant a new trial.

QUESTION III

"Did the trial judge err by excluding evidence proffered by appellant with respect to pending injunction suit in Richland County Court by appellant against City of Columbia?"

The record shows that the appellant on October 24, 1968, through counsel not heretofore mentioned in this proceeding, commenced an action against the City of Columbia in the Richland County Court asking that the City of Columbia be enjoined from using its

powers of eminent domain to condemn the property here involved for the benefit of the South Carolina Tricentennial Commission. The counsel contends that evidence relative to this county court action should have been admitted in evidence to show prejudice of witnesses for the respondent and as it might affect their credibility. Although evidence attacking the credibility of an adverse witness is normally admissible, we cannot say that there has been reversible error since the testimony of the witnesses is not before us.

QUESTION IV

"Did the errors and/or abuses of discretion on the part of the trial judge, taken together as a whole, constitute a denial of due process of law guaranteed to this appellant by the State and Federal Constitutions?"

The effect of appellant's contention in this question is to generally attack the entire procedure. Counsel argues that four days' notice of the hearing resulting in Judge Timmerman's order of November 20, 1969, was not given as required by the Code. This order, among other things setting the trial for December 1, is not the type of order contemplated by the Code. The trial judge may set a case for trial without a four day notice, or for that matter, may call a case to trial without any order having previously been issued. The fact that the appellant was advised that the case would be tried on a certain day should have been helpful in preparation of the case. If it was difficult for counsel to prepare for

trial after he was belatedly employed, such is largely attributable to his client's failure to arrange for her own representation. It is not an error attributable to the court.

In a condemnation proceeding the issues are simple. The Court is in quest of the reasonable fair market value of the property taken. There is nothing in the transcript before us to convince us that ample opportunity to explore that issue was not afforded the landowner.

The appeal in the condemnation case is accordingly found to be without merit, and the judgment of the lower court in both the injunction proceeding and the condemnation proceedings is,

AFFIRMED.

MOSS, C.J., LEWIS, BUSSEY AND BRAILSFORD, J., concur.

CERTIFICATE OF MAILING

In accordance with Rule 33 of the Rules of the Supreme Court of the United States, I hereby certify that I have this 16 day of September, 1976, filed the required copies of the Petition for Writ of Certiorari in the Clerk's Office and have mailed the required copies of the Petition for Writ of Certiorari to Daniel R. McLeod, Attorney General, P. O. Box 11549, Wade Hampton State Office Building, Columbia, South Carolina 29201.

J. Wesley Drawdy

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